

**Department of Health and Human Services**

**DEPARTMENTAL APPEALS BOARD**

**Civil Remedies Division**

Bledsoe Family Medicine,

Petitioner,

v.

Centers for Medicare & Medicaid Services.

Docket No. C-15-2324

Decision No. CR4564

Date: March 30, 2016

**DECISION**

Palmetto GBA, an administrative contractor for the Centers for Medicare & Medicaid Services (CMS), revoked the Medicare enrollment and billing privileges of Petitioner, Bledsoe Family Medicine, on the basis that Petitioner's owner had been convicted of a felony offense within the preceding 10 years to Petitioner's Medicare enrollment. Palmetto GBA affirmed the revocation in its reconsidered determination. Petitioner appealed. CMS now moves for summary judgment. I find that the material facts surrounding Petitioner's owner's felony conviction are undisputed and that CMS had a basis for the revocation. Therefore, I grant summary judgment in favor of CMS.

**I. Case Background and Procedural History**

Petitioner's owner, Horace Bledsoe, M.D., is a physician licensed to practice medicine in South Carolina. CMS Exhibit (Ex.) 8 at 1. On July 22, 2009, a grand jury indicted Dr. Bledsoe and a co-defendant on three felony counts of acquiring and obtaining testosterone, a Schedule III controlled substance, by misrepresentation, fraud, deception and subterfuge, on or about October 2, 2008, December 26, 2008, and February 4, 2009, in violation of 21 U.S.C. § 843(a)(3). CMS Ex. 4 at 5-6. On October 15, 2009, before the U.S. District Court for the District of South Carolina, Dr. Bledsoe pled guilty to Count 1 of the Indictment, Obtaining Testosterone by Fraud, a felony offense, in

violation of 21 U.S.C. § 843(a)(3). CMS Br. at 2; P. Response at 1; *see also* CMS Exs. 1 at 1; 2 at 1. On December 17, 2009, the District Court entered a judgment of conviction against Dr. Bledsoe based on his guilty plea, dismissed Counts 2 and 3, assessed him \$100, and sentenced him to probation for three years. CMS Ex. 4 at 1-4.

On January 10, 2010, Dr. Bledsoe submitted a CMS-855B application to enroll Bledsoe Family Medicine, in the Medicare program as a single specialty clinic family practice. CMS Ex. 5 at 3, 7. Although Dr. Bledsoe, as Petitioner's owner, was required to report his felony offense because it had occurred within the 10 years preceding his enrollment of Bledsoe Family Medicine, LLC, the application CMS presents does not show Petitioner did so. *Id.* at 6 (showing "No" was checked under section 3, final adverse action history, for Petitioner's CMS- 855B application submitted by Dr. Bledsoe); 9 (showing "No" was checked for final adverse history under section 5 of Petitioner's CMS-855B submitted by Dr. Bledsoe). Dr. Bledsoe signed the CMS-855B enrollment application as Petitioner's authorized official, certifying that the information was "true, correct, and complete." *Id.* at 11.

Dr. Bledsoe then submitted a CMS-855R reassignment of benefits application on February 17, 2010, reassigning his benefits to Petitioner. CMS Ex. 6 at 7, 9. With the CMS-855R submission, Dr. Bledsoe attached a letter from his attorney dated January 10, 2010, and addressed to Palmetto GBA. The letter stated that Dr. Bledsoe had been convicted of a felony offense related to fraudulently obtaining and administering testosterone on himself, a medical assistant and several patients. CMS Ex. 6 at 16-18. Palmetto GBA received the letter on February 17, 2010. *Id.* By letter dated July 22, 2010, Palmetto GBA approved Bledsoe Family Medicine's enrollment application in the Medicare program, effective January 18, 2010. CMS Ex. 3 at 4-5.

On October 1, 2010, Dr. Bledsoe filed a CMS-855I application to report a change in address for his practice, Bledsoe Family Medicine. CMS Ex. 7 at 5. However, Dr. Bledsoe did not disclose his 2009 felony conviction on the CMS-855I application. CMS Ex. 7 at 4 ("No" was checked for final adverse history including any conviction. Dr. Bledsoe signed the certification statement in section 15 of the application on October 1, 2010.). *Id.* at 8.

On January 22, 2015, Palmetto GBA, notified Petitioner that its Medicare billing privileges were being revoked effective October 15, 2009. The letter also advised Petitioner that a three-year re-enrollment bar was being imposed. CMS Ex. 2. The notice letter cited 42 C.F.R. § 424.535(a)(3) as the basis for the revocation and 42 C.F.R. § 424.535(c) as the basis for the re-enrollment bar. *Id.* Specifically, the notice letter stated that due to Dr. Bledsoe's October 15, 2009 conviction and the fact that Dr. Bledsoe was listed as a "5% or more owner and as an authorized official of Bledsoe Family Medicine," Petitioner's Medicare enrollment and billing privileges were being revoked. *Id.* at 1.

Petitioner requested reconsideration, and on March 3, 2015, the CMS Center for Program Integrity, Provider Enrollment Operations Group upheld Petitioner's revocation based on 42 C.F.R. § 424.535(a)(3) due to Dr. Bledsoe's guilty plea to one felony count of Obtaining Testosterone by Fraud. The letter stated further that "the reason for revocation is for the existence of the guilty plea and there is no evidence to correct this deficiency." CMS Ex. 1 at 1-2.

Petitioner timely requested a hearing (RFH) before an Administrative Law Judge (ALJ). The case was assigned to me for hearing and decision, and I issued an Acknowledgment and Pre-Hearing Order (Pre-Hearing Order) to the parties. In accordance with the terms of the Pre-Hearing Order, CMS submitted its motion for summary judgment and supporting brief (CMS Br.), and CMS Exs. 1-9. After reviewing CMS's exchange, Petitioner filed a response opposing the CMS motion for summary judgment (P. Response), and P. Exs. 1- 20. Absent objections, I enter all proposed exhibits into the record.

## **II. Discussion**

### **A. Issues**

1. Whether summary judgment is appropriate; and
2. Whether CMS had a legal basis to revoke Petitioner's Medicare enrollment and billing privileges.

### **B. Findings of Fact and Conclusions of Law**

#### ***1. Summary judgment in favor of CMS is appropriate.***

Summary judgment is appropriate if "the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Senior Rehab. & Skilled Nursing Ctr.*, DAB No. 2300, at 3 (2010) (citations omitted). The moving party must show that there are no genuine issues of material fact requiring an evidentiary hearing and that it is entitled to judgment as a matter of law. *Id.* If the moving party meets its initial burden, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial . . .'" *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). "To defeat an adequately supported summary judgment motion, the non-moving party may not rely on the denials in its pleadings or briefs, but must furnish evidence of a dispute concerning a material fact, a fact that, if proven, would affect the outcome of the case under governing law." *Senior Rehab.*, DAB No. 2300, at 3. To determine whether there are genuine issues of

material fact for hearing, an ALJ must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor. *Id.*

Here, CMS moved for summary judgment and provided documentary evidence that sufficiently establishes the material facts of the case. CMS Br. at 1; CMS Exs. 1-9. CMS proffered documentary evidence showing that Dr. Bledsoe pled guilty to and was convicted of a felony that CMS has determined is detrimental to the best interests of the Medicare program and its beneficiaries. CMS Ex. 4.

Petitioner does not dispute that Dr. Bledsoe pled guilty to the felony offense of acquiring and obtaining Testosterone, a Schedule III controlled substance, by misrepresentation, fraud, deception and subterfuge. *See* RFH at 2; P. Response at 1. Petitioner claims there are material issues in dispute that would preclude summary judgment, mainly that CMS had actual knowledge of Dr. Bledsoe's conviction in March 2010 when it approved Petitioner to participate in the Medicare program and that CMS allowed Petitioner to bill Medicare for services rendered from July 18, 2010, through January 22, 2015, before revoking Petitioner's enrollment based on Dr. Bledsoe's felony conviction retroactive to October 15, 2009. According to Petitioner, CMS's actions were arbitrary, capricious, unreasonable and an abuse of CMS's discretion. P. Response at 1-6. However, I find Petitioner's arguments do not raise any genuine issue of disputed material fact. The only issue I need to resolve in this case is a matter of law, which as discussed below, I must decide in CMS's favor.

***2. Petitioner does not dispute that Dr. Bledsoe pled guilty to a felony offense for obtaining testosterone by fraud, and that his conviction was within ten years of Petitioner submitting its CMS-855B Medicare enrollment application.***

Petitioner does not dispute that Dr. Bledsoe pled guilty to a felony in October 2009, and on December 17, 2009, the U.S. District Court for the District of South Carolina entered judgment of conviction against Dr. Bledsoe based on his guilty plea of Obtaining Testosterone by Fraud in violation of 21 U.S.C. § 843(a)(3). *See* CMS Ex. 4 at 1-4. Petitioner also does not dispute that Dr. Bledsoe's guilty plea and conviction occurred within the 10 years preceding Petitioner's filing of its CMS-855B Medicare enrollment application. Dr. Bledsoe, on behalf of Petitioner, submitted a CMS-855B enrollment application on January 10, 2010, in order to enroll Petitioner in the Medicare program. CMS Ex. 5 at 3, 7. Because Dr. Bledsoe was convicted of a felony offense on December 17, 2009, and sought enrollment for Petitioner on January 10, 2010, Dr. Bledsoe's guilty plea and conviction fell within the ten years preceding Petitioner's submission of its January 10, 2010 Medicare enrollment application.

**3. CMS was authorized to revoke Petitioner's enrollment under 42 C.F.R. § 424.535(a)(3) based on Dr. Bledsoe's felony conviction.**

CMS may revoke a currently enrolled provider or supplier's Medicare billing privileges and any corresponding provider agreement or supplier agreement for several enumerated reasons, including:

(3) Felonies. The provider, supplier, or any owner of the provider or supplier, within the 10 years preceding enrollment or revalidation of enrollment, was convicted of a Federal or State felony offense that CMS has determined to be detrimental to the best interests of the [Medicare] program and its beneficiaries.

(i) Offenses include—

\* \* \*

(D) Any felonies that would result in mandatory exclusion under section 1128(a) of the Act.

42 C.F.R. § 424.535(a)(3)(i)(D); *see also* Social Security Act (Act) § 1842(h)(8) (authorizing the Secretary of Health and Human Services to revoke the enrollment of a physician or supplier convicted of a federal or state felony offense the Secretary “determines is detrimental to the best interests of the program or program beneficiaries”). After CMS revokes a provider's or supplier's billing privileges, the provider or supplier cannot participate in Medicare from the effective date of the revocation until the end of the re-enrollment bar. The re-enrollment bar must last for a minimum of one year but cannot exceed three years. 42 C.F.R. § 424.535(c).

The regulation at 42 C.F.R. § 424.535(a)(3)(i) gives examples of certain offenses CMS has already determined to be detrimental to the Medicare program. Any offense that would result in mandatory exclusion under section 1128(a) of the Act is one such example. 42 C.F.R. § 424.535(a)(3)(i)(D). It is well settled that felony convictions related to the unlawful prescription or dispensing of a controlled substance justify mandatory exclusion pursuant to section 1128(a)(4) of the Act. Dr. Bledsoe's conviction for Obtaining Testosterone by Fraud is a type of an offense that falls squarely within the scope of an 1128(a)(4) mandatory exclusion. *See, e.g., Nenice Marie Andrews*, DAB No. 2656 (2015); *Shaikh M. Hasan, M.D.*, DAB No. 2648 (2015). Therefore, CMS has determined that Dr. Bledsoe's offense is detrimental to the Medicare program and its beneficiaries.

Here, Dr. Bledsoe was listed as a 5% or more owner and as an authorized official of Bledsoe Family Medicine. CMS Ex. 1 at 1. Because Dr. Bledsoe owned Bledsoe Family

Medicine, CMS has a basis to revoke Bledsoe Family Medicine's enrollment under 42 C.F.R. § 424.535(a)(3) based on Dr. Bledsoe's felony conviction. *Dinesh Patel*, DAB No. 2551, at 5 (2013); *Fady Fayad, M.D.*, DAB No. 2266, at 7 (2009), *aff'd*, 803 F. Supp. 2d 699 (E.D. Mich. 2011); *Abdul Razzaque Ahmed, M.D.*, DAB No. 2261, at 19 (2009), *aff'd*, 710 F. Supp. 2d 167 (D. Mass. 2010).

Petitioner argues that CMS took five years to exercise its discretionary authority to revoke Petitioner's billing privileges. P. Response at 4. Petitioner argues that in the interim, even though CMS had full knowledge of Dr. Bledsoe's 2009 felony conviction, CMS allowed Dr. Bledsoe to provide services to Medicare beneficiaries and allowed Petitioner to bill Medicare for these services. *Id.* Petitioner also argues that CMS's delay in exercising its discretionary authority to revoke Petitioner's billing privileges retroactive to 2009 has resulted in a considerable overpayment for Petitioner. *Id.* at 3. Petitioner argues that CMS's actions are "unconscionable and inequitable," and an abuse of CMS's discretionary authority. *Id.* at 5-6. Petitioner claims that Medicare is demanding recoupment in excess of three hundred thousand dollars and that CMS's actions are in violation of the Fifth Amendment and that CMS should be equitably estopped. *Id.* at 6-9.

However, my review authority is limited to reviewing initial determinations "to deny or revoke a provider or supplier's Medicare enrollment in accordance with . . . § 424.535." 42 C.F.R. § 498.3(b)(17). I may only review whether CMS has established a legal basis for its determination to revoke Petitioner's enrollment. *Letantia Bussell, M.D.*, DAB No. 2196, at 12-13 (2008) (concluding that an ALJ review of revocation of enrollment for felony offenses under section 1842(h) of the Act is "limited to whether CMS had established a legal basis for its actions."). Recoupment of payments to providers and suppliers and the collection and compromise of overpayments is regulated by 42 C.F.R. pt. 405, subpt. C. The review of the alleged overpayments is not a matter within my jurisdiction. Review of alleged overpayments and their collection is governed by 42 C.F.R. pt. 405 subpts. H and I. I also do not have the ability to consider retroactive payment consequences that CMS takes into consideration when exercising its discretion. *Lorrie Laurel*, DAB No. 2524, at 7-8 (2013).

Where CMS proves that Petitioner was convicted of an offense applicable to 42 C.F.R. § 424.535(a)(3)(i)(D), I must sustain the revocation. I must do so "regardless of other factors, such as the scope or seriousness of the supplier's criminal conduct and the potential impact of revocation on Medicare beneficiaries that CMS might reasonably have weighed in exercising its discretion." *Fady Fayad, M.D.*, DAB No. 2266, at 16 (2009), *aff'd*, 803 F. Supp. 2d 699 (E.D. Mich. 2011).

As for Petitioner's request for equitable relief, I have no authority to grant equitable relief. *US Ultrasound*, DAB No. 2302, at 8 (2010) ("[n]either the ALJ nor the Board is authorized to provide equitable relief by reimbursing or enrolling a supplier who does not

meet statutory or regulatory requirements.”). I am also required to follow the Act and regulations and have no authority to declare statutes or regulations invalid. *1866ICPayday.com, L.L.C.*, DAB No. 2289, at 14 (2009) (“[a]n ALJ is bound by applicable laws and regulations and may not invalidate either a law or regulation on any ground.”).

### **III. Conclusion**

Based upon the undisputed facts, CMS was authorized under 42 C.F.R. § 424.535(a)(3) to revoke Petitioner’s billing privileges and I am required to sustain CMS’s determination. Petitioner is barred from re-enrolling in the Medicare program for three years from the date of the revocation. Petitioner must submit a new enrollment application after the termination of the enrollment bar in order to request re-enrollment. 42 C.F.R. § 424.535(d)(1).

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/s/  
Joseph Grow  
Administrative Law Judge